

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1492

To be argued by
DAVID W. O'CONNOR

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1492

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAYMOND PHILLIPS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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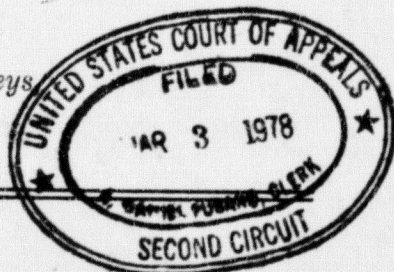




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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1492

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAYMOND PHILLIPS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Raymond Phillips appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on November 1, 1977, after a two-day jury trial before the Honorable Lee P. Gagliardi, United States District Judge.

Indictment 77 Cr. 487, filed June 27, 1977, charged Phillips in one count with escape from the custody of the Attorney General, in violation of Title 18, United States Code, Section 751(a).

Trial commenced on October 31, 1977* and concluded on November 1, 1977, when the jury returned a verdict of guilty against Phillips.

* A previous trial on the same charge ended with a hung jury and the declaration of a mistrial.

On November 30, 1977, Judge Gagliardi sentenced Phillips to a term of fifteen months' imprisonment. Phillips presently is serving his sentence.

Statement of Facts

A. The Government's Case

On April 12, 1976, Raymond Phillips was confined in the Federal Community Treatment Center ("FCTC") in New York City, serving a term of imprisonment imposed by a judgment of conviction for transportation of stolen vehicles in interstate commerce, 18 U.S.C. § 2312 (Tr. 19).^{*} Phillips originally started his imprisonment at the Danbury Correctional Institution ("Danbury") and was transferred from Danbury to the less-restrictive FCTC on March 15, 1976. (Tr. 21). On the evening of April 13, 1976, Phillips, away from the FCTC on a day-pass, did not return by 1 A.M. to the FCTC, as was required under the rules of the Bureau of Prisons. (Tr. 22). Instead, taking advantage of the minimal security restrictions in the FCTC, Phillips made good his escape from custody and remained at large for an entire year.

One year later, at 3 A.M. on April 14, 1977, Phillips was found sleeping in a vehicle on the side of a road by Officer Vincent Lenci of the Westchester County Parkway Police. Phillips falsely identified himself to the officer as "Robert Muller." Subsequently, Phillips was taken into custody by Officer Lenci after a check of the license plate number of the car in which Phillips was found. (Tr. 28).

Phillips was interviewed shortly after his arrest by Sgt. Peter Ringler of the Westchester County Parkway Police. Phillips, who had been introduced to Ringler as

^{*} "Tr." refers to pages in the trial transcript; "GX" refers to Government Exhibit; "Br." refers to Appellant's Brief on appeal.

"Robert Muller," upon questioning by Ringler finally admitted that he was Raymond Phillips and produced his inmate's number. (Tr. 33).

Later on the same day Phillips was taken into federal custody by Special Agent Julian Perez of the FBI. After he was fully informed of his constitutional rights, Phillips told Perez that he was an escaped prisoner from the FCTC, and stated that he left because the FCTC was a "hassle" and that he had no intention of ever returning to the facility. (Tr. 34).

B. The Defendant's Case

Phillips testified in his own behalf as the only witness in the defense case.

Phillips claimed that against his desire he had been forced to leave Danbury and go to the FCTC halfway house. (Tr. 44-45). It was Phillips' purported defense that his displeasure with commitment at the FCTC led to his escape.

Defendant admitted that upon his arrival, on March 15, 1976, at the FCTC, he had signed the form acknowledging receipt of the rules and regulations of the FCTC, but denied that in fact he had received a copy of the rules. (Tr. 46). Phillips testified that while at the FCTC he was employed at the Bigelow Pharmacy on Sixth Avenue and Eighth Street. (Tr. 46).

According to Phillips, on the weekend of April 10, 1976, he left the FCTC on a pass, and gave a pay telephone number in Riverside Park as his contact for the weekend. (Tr. 52-53). Phillips testified that upon his return to the FCTC he was confronted by a Mr. Moody who threatened to send him back to Danbury if Phillips told him another lie about where he was staying on the weekend. (Tr. 54).

Phillips stated that two nights later, he left the FCTC and did not return when he was supposed to because the FCTC was "too much hassle." (Tr. 55).

Phillips denied falsely identifying himself as "Robert Muller" to Officer Lenci on the night he was arrested in 1977. (Tr. 56-57).

On cross-examination, Government's Exhibit 5 was introduced into evidence: a copy of a request form filled out by Phillips in Danbury asking to be sent to the FCTC. Although Phillips denied that the signature on the request was his, a simple comparison between the signature on the form and that on a known exemplar of Phillips made clear that defendant's denial was false. (Tr. 57-59).

Phillips admitted on cross that on April 13, 1976, the day he did not return to the FCTC, he knew that he was supposed to return and did not return.*

C. The Government's Rebuttal Case

In rebuttal the Government re-called Officer Lenci of the Westchester County Parkway Police and introduced a copy of his arrest report for the April 14, 1977 arrest of Phillips. The report was made out for a "Robert Muller" and did not mention the name Phillips. (Tr. 66; GX 6).

* Phillips also admitted that he never turned himself in to the FBI at any time after April 13, 1976. (Tr. 61).

ARGUMENT

POINT I

The Trial Judge Did Not Improperly Restrict the Scope of Defendant's Case.

Phillips argues that two rulings by Judge Gagliardi deprived defendant of the opportunity to establish a lack of intent to escape based upon Phillips' view that life in the FCTC was a "hassle." Specifically, Phillips contends that the experienced district judge erred in refusing to permit a prison official to testify to general conditions at the FCTC, and unfairly restricted defendant's testimony on direct examination. Contrary to defendant's claims, the record demonstrates that Phillips was not unduly restricted from presenting his defense, which, in any event, was insufficient as a matter of law.

The first ruling attacked by Philips related to the witness Matthew Walsh. The Government called Walsh, the director of the FCTC from which Phillips escaped, for the sole purpose of identifying official Bureau of Prisons' records for which he was the custodian. On cross-examination, objections to defense counsel's efforts to exceed the scope of the limited direct examination, by reference to general customs at the FCTC, were properly sustained by Judge Gagliardi pursuant to Fed. R. of Evid. 611. Thereafter, defense counse made an offer of proof as to Walsh's proposed testimony and indicated that Walsh would testify with respect to the practice of allowing prisoners at the FCTC to leave on weekends. Phillips claimed that this testimony would advance his defense that because he was "hassled" at the FCTC he lacked the requisite intent to commit the crime of escape. Judge Gagliardi, after hearing argument on the proffered testimony, determined that it was not relevant to the issues at trial and excluded the testimony.

This ruling was correct and surely did not amount to an abuse of the District Court's broad discretion. Fed. R. of Evid. 403; *United States v. King*, 860 F.2d 122 (2d Cir. 1977). See also, *United States v. Bove*, 360 F.2d 1 (2d Cir.), cert. denied, 385 U.S. 961 (1966); *United States v. Kahn*, 472 F.2d 272 (2d Cir.), cert. denied, 411 U.S. 982 (1973). Even assuming for the sake of argument that Phillips' "hassle" contention presented a valid defense, the proffered testimony simply had no relevance to Phillips' claim. Since, according to the defense, it was Phillips' reaction to conditions experienced personally by him at the FCTC which resulted in his escape, the general practice at the FCTC to permit, or even to encourage, prisoners to leave the institution could not have furthered defendant's argument. On the other hand, a general inquiry into conditions at the FCTC likely would have directed the jury's attention to collateral matters.

Although the trial court properly excluded the proffered testimony from Walsh, Judge Gagliardi made clear that he would not foreclose testimony from Phillips himself about conditions at the FCTC and defendant's personal reaction to confinement in the institution. Thereafter, during direct examination of Phillips, defense counsel was allowed substantial leeway to bring out defendant's assertions that he was forced to leave Danbury for the FCTC against his will* (Tr. 45), and that he was threatened by an FCTC official with a return to confinement at Danbury if he again lied about his whereabouts on leave.** (Tr. 54).

* An assertion clearly proved false by GX 5, the form signed by defendant requesting a transfer from Danbury, which was introduced during the cross-examination of Phillips.

** Phillips' claim that he was "threat[ened]" with return to Danbury, of course, was at odds with his original defense that he wanted to stay at Danbury.

Although defendant was accorded broad scope in his own defense, Phillips points to two questions to which objections were sustained * and argues that this amounted to a restriction on the defense. Again, it is unclear how either of these questions would have elicited information relevant to the defense, and defense counsel did not make an offer of proof with respect to either inquiry to demonstrate the relevance of the pending question. See, Fed. R. of Evid. 103(a)(2); *United States v. Stirling*, Dkt. Nos. 77-1140, 1141, 1144, 1177-78, slip op. 1455-56 (2d Cir., February 2, 1978). Moreover, it is plain from a reading of Phillips' testimony that even if these two questions might have elicited relevant information, Phillips' still enjoyed and used a complete opportunity to present his lack of intent defense. In short, defendant was not hampered in any significant way by exclusion of this testimony and made no claim at trial that his defense was so—restricted.**

In any event, Phillips' claim of an unfair restriction on the defense is rendered wholly specious and totally without merit since it is clear on this record that the so-called "hassle" defense was legally inapposite.

It is well-settled that to establish the crime of "escape" the Government need only prove that a defendant intended voluntarily to absent himself from custody for the

* The two questions were as follows:

"Q. During that first week on what floor did you sleep?"

Mr. O'Connor: Objection.

The Court: Yes, sustained.

Q. Were your facilities during the week and weekend the same, Mr. Phillips?

Mr. O'Connor: Objection.

The Court: Sustained." (Tr. 48).

** Defendant concedes on appeal that Judge Gagliardi's charge on the requisite intent necessary under the statute was proper, and essentially as defendant requested.

purpose of avoiding confinement. *United States v. Spletzer*, 535 F.2d 950 (5th Cir. 1976); *United States v. Nix*, 501 F.2d 516 (7th Cir. 1974); *United States v. McCray*, 468 F.2d 446 (10th Cir. 1972). In the context in which it is used in the statute, the term "voluntarily" plainly means knowingly willfully and not as a result of coercion or mistake. Phillips' suggestion is absurd that being "hassled" by half-way house conditions negated the "voluntariness" of his departure to avoid confinement. Indeed, under defendant's view of the crime, any prisoner is entitled to escape so long as he is unhappy with prison life.* Phillips' purported defense did not suggest facts sufficient to raise a valid legal defense of coercion or compulsion. This Court, along with other appellate Courts, has made clear that duress, compulsion or coercion exists as a defense only when the alleged coercion is present and immediate, and of such a nature to induce a well-founded fear of impending death or serious bodily injury, which cannot reasonably be avoided without committing the crime. *United States v. Housand*, 550 F.2d 818 (2d Cir. 1977); *United States v. Gordon*, 526 F.2d 406 (9th Cir. 1975); *United States v. McClain*, 531 F.2d 431 (9th Cir. 1976). Obviously, Phillips' defense fell far short of establishing facts sufficient to make out such a defense, and there was no suggestion that defendant's "hassle" amounted to an instability, let alone an insanity, which somehow could have negated his clear intent. Cf. *United States v. Stead*, 528 F.2d 257 (8th Cir. 1975), *cert. denied*, 425 U.S. 257 (1976). In sum, the trial judge prop-

* Phillips' proposed defense, if credited, would lead to innovative but equally absurd results in other cases: thus, a person disillusioned (or "hassled") by society, could claim with impunity as a defense such discomfort as a license to sell heroin, rob a bank, or to commit an endless variety of crimes. While such peculiar personal views might go to a defendant's reason or motive for committing a crime, they hardly suggest a valid defense that one did not intend to commit a crime.

erly could have excluded all evidence proffered by Phillips on the claim of his "hassle" with jail conditions; in the face of the District Court's generosity in permitting defendant to make a full factual showing and argument on this improper defense, Phillips hardly can claim that he was prejudiced by Judge Gagliardi's evidentiary rulings.*

POINT II

Prosecution Under Section 751(a) Following Administrative Action By the Bureau of Prisons Does Not Violate the Due Process Clause.

Although Phillips acknowledges the well-settled proposition that a federal criminal prosecution under 18 U.S.C. § 751(a) does not subject a defendant to double jeopardy even after the Bureau of Prisons has taken disciplinary action against an escapee by confiscating the escapee's "good time," see *United States v. Stead*, *supra*; *United States v. Williamson*, 469 F.2d 89 (5th Cir.), 410 U.S. 943 (1972), he argues, without support, that such a

* A coercion or compulsion defense, even assuming there were facts to support it, would have been to no avail for Phillips. Escape is a continuing crime. Thus, even if Phillips had been able to establish that he had been coerced to leave the FTTC, his continuous absence for over one year still would have made him guilty of the crime of escape.

In *United States v. Chapman*, 455 F.2d 746 (5th Cir. 1972), the Court ruled that even if a defendant could show that he was forced to join an escape because of threats of bodily harm by his fellow prisoners and that he didn't turn himself in immediately thereafter because of fear of brutalization by deputy sheriffs, his subsequent and continuous absence from custody constituted an escape. See also, *United States v. Woodring*, 464 F.2d 1248 (10th Cir. 1972). Consequently, it is quite apparent that even if Phillips had been compelled or coerced into leaving the FCTC, the fact that he never turned himself in for over one year rendered that defense moot.

prosecution nevertheless violates due process in that it involves "a basic unfairness to federal prisoners." (Br. 18). Defendant's argument obviously is frivolous.

First, although dressed with the appellation of a "basic unfairness," defendant's claim essentially is the same double jeopardy argument which uniformly has been rejected as without merit by every Court to have considered the issue. *United States v. Stead, supra*; *United States v. Williamson, supra*; *Hutchison v. United States*, 450 F.2d 930 (10th Cir. 1971); *United States v. Apker*, 419 F.2d 388 (10th Cir. 1969); *Keaveny v. United States*, 405 F.2d 821 (5th Cir. 1969). Second, defendant has not suggested in any way how a criminal prosecution which follows administrative action is basically unfair. The administrative action resulting in forfeiture of "good time" is no more than a proper recognition that the prisoner's previous rehabilitation which would have earned him an earlier release on his original sentence, now has been placed in doubt by his flagrant violation of prison security and authorized rules. The criminal prosecution, on the other hand, gives recognition to the fact that the prisoner also has committed a new federal crime by his escape, against which society deserves protection by proper enforcement of the law. Having endangered society by his escape from confinement, the prisoner should not be heard to complain that what he views as an overall penalty for his illegal conduct is too severe.

Finally, as implicitly recognized in Phillips' brief, (Br. 17-18) the claim of unfairness particularly is startling in this case. Although Phillips faced a possible five-year sentence for his escape, Judge Gagliardi sentenced him to an additional term of only fifteen months, explicitly taking into account as a factor defendant's administrative forfeiture of good time. Thus, there simply is no basis for Phillips' claim that the criminal prosecution denied him due process.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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United States

v.

Phillips

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

David W O'Farrell being duly sworn,
deposes and says that he is employed in the office of the
United States Attorney for the Southern District of New York

That on the *30th* day of *March* 1978 he
served a copy of the within *appellate brief*
by placing the same in a properly postpaid franked envelope
addressed as follows:

William Ellis Esq.
Ellis Stringfellow Peim + Leibowitz
51 E. 42nd St
NY NY 10017

And deponent further says that he sealed the said envelope
and placed the same in the mail chute drop for mailing in t

U.S. Courthouse Annex
Borough of Manhattan, City of New York.

Attested to:
David S O'Farrell

Sworn to before me this

day of